No. 88-6025

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

REUBEN DOWLING, PETITIONER

v.

UNITED STATES OF AMERICA
AND
GOVERNMENT OF THE VIRGIN ISLANDS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, in petitioner's trial for offenses arising out of a bank robbery, the trial court erred by admitting evidence of a separate robbery of which petitioner had been acquitted in a prior trial.

2. If the admission of that evidence was error, whether the error was harmless.

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OPINION BELOW

The opinion of the court of appeals (J.A. 30-49) is reported at 855 F.2d 114.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1988. A petition for rehearing was denied on September 28, 1988 (J.A. 50). The petition for a writ of certiorari was filed on November 28, 1988 (a Monday), and was granted on February 27, 1989 (J.A. 51). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULES INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States provides:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides:

> [N]or [shall any person] be deprived of life, liberty, or property, without due process of law[.]

The "harmless error" statute, 28 U.S.C. 2111, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 404(b) of the Federal Rules of Evidence provides:

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

> **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

Following a jury trial in the District Court of the Virgin Islands, petitioner was convicted on one count of bank robbery, in violation of 18 U.S.C. 2113(a); two counts of first-degree robbery, in violation of V.I. Code Ann. tit. 14, § 1862(2) (Supp. 1988); two counts of third-degree assault, in violation of V.I. Code Ann. tit. 14, § 297(2) (Supp. 1988); one count of grand larceny, in violation of V.I. Code Ann. tit. 14, § 1083(1) (1964); and one count of unauthorized use of a vehicle, in violation of V.I. Code Ann. tit. 14, § 1382 (Supp. 1988). He was sentenced to 70 years' imprisonment. J.A. 12-14.[1]

1. a. The evidence at trial showed that on the afternoon of July 8, 1985, a man armed with a pistol and wearing a mask robbed the First Pennsylvania Bank in Frederiksted, St. Croix. Between 2:15 and 2:30 p.m., shortly before the bank closed, the robber entered the bank and jumped over the counter into the tellers' cages. After ordering "nobody move," the robber pointed his gun at the teller nearest him and told her to open her cash drawer. The teller quickly complied, and the robber took more than $2000 in cash and stuffed it into a brown paper bag. The robber proceeded to the next teller station, which was unoccupied, but he was unable to open the locked cash drawers. He then moved to the next station and, pointing his gun at the teller there, ordered her to open her cash drawers. She complied, and the robber took more than $5000 from her. 9/22 Tr. 92, 95, 100-104, 110, 117-118, 120, 123-124, 146, 151-152, 158-159, 187.

The robber wore a blue or black woven ski mask or herb hat with two holes cut out for the eyes. He also wore a green army fatigue shirt, blue jeans or dark pants, white

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[1] This case arises from petitioner's third trial on the present charges. At the first trial, the jury failed to reach a verdict. At the second trial, petitioner was convicted, but the court of appeals reversed on the ground that petitioner may have been prejudiced by the jury's exposure to newspaper accounts of the fact that petitioner had been charged with committing another robbery and a murder while on bail awaiting his bank robbery trial. *Government of the Virgin Islands* v. *Dowling*, 814 F.2d 134, 141 (1987).

sneakers, and gloves. The pistol he carried was a "black and shiny" small caliber handgun. The robber was described as being tall, fit, and athletically built. See 9/22 Tr. 97-98, 110-111, 120, 124, 126, 147, 152, 159-160, 187-188.

The robber left the bank and ran to a parking lot across the street. After running around for a short time there, he began running up and down the street, apparently looking for something. 9/22 Tr. 108, 154-155, 190, 222-223. The robber then stepped in front of an approaching taxi van and stopped it. The robber went to the driver's side of the van, pointed his gun at the taxi driver, and pulled the driver out of the van. As the robber drove off with the windows rolled down, he started to pull off his mask. 9/22 Tr. 160-161, 165-167, 170-171, 173-174, 180, 182, 223-224.

Antonio Messer was in the bank when the robbery began, but he managed to slip out. While he hid behind a pillar in front of a building near the street, he saw the robber leave the bank, run around, and commandeer the taxi van. Messer then watched the robber drive toward him and pull up his mask. Messer was approximately 15 feet away when the robber drove past, and, because the robber had pulled up his mask by that time, Messer got a good look at the robber's face, both head on and from the side. 9/22 Tr. 188-195, 222-226, 236-238. At trial, Messer identified petitioner as the robber. 9/22 Tr. 198, 239.

After making his getaway, the robber drove the taxi van into the front yard of a house about a mile outside of Frederiksted. Hayde Pichardo, who was sewing in her bedroom near the window, heard the van and looked out the open window as the van drove into her front yard. She became upset because her young children were playing outside, and she shouted an obscenity at the driver. The driver stopped the van and stuck his head out the window to see who had shouted at him. Pichardo got a good look

at the driver's face from about 21 feet away. 9/22 Tr. 242, 246, 258-261, 270-271. At trial, Pichardo identified petitioner as the driver of the van. 9/22 Tr. 246.

Amada Rosario, Pichardo's 17-year-old daughter, was sitting near the window watching television when she heard the taxi van pull into the front yard. She looked out the open window of the dining room, and she heard her mother yell at the driver. She was on the same level as the taxi van, and she could see directly into the driver's side of the van, which was nearest to her. When the driver stuck his head out of the window, Rosario saw his face from about 24 feet away. 9/23 & 9/24 Tr. 4-5, 16-21. At trial, Rosario also identified petitioner as the driver of the van. 9/23 & 9/24 Tr. 16, 37.

b. The day before the robbery, petitioner borrowed a white Volkswagen from a friend, Philip Tutein. 9/23 & 9/24 Tr. 37-40, 63-65. On the morning of the robbery, a police officer saw Tutein's Volkswagen stalled in the middle of the road. One of the occupants of the car was a medium to heavy built dark male wearing a knitted herb hat and a green army fatigue shirt. 9/23 & 9/24 Tr. 44, 46, 49-50.

Between 2:15 and 2:20 p.m. on the day of the robbery, a police officer in Frederiksted saw a white Volkswagen parked near the bank with its front door open into the street. The occupants of the car were Delroy Christian and a second individual. The officer told the two men to close the door, and they drove away to the north. The officer and her partner followed the Volkswagen for about a mile before returning to town. Shortly thereafter, the officers received a radio report that the bank had been robbed. 9/23 & 9/24 Tr. 52-56.

2. Before opening statements, the government disclosed its intention to offer the testimony of Vena Henry pursuant to Fed. R. Evid. 404(b). The district court con-

ducted a hearing to determine whether that evidence should be admitted. J.A. 15-25.

According to the government's proffer, Henry would testify that petitioner and Delroy Christian had entered her house on July 21 or 22, 1987, approximately two weeks after the bank robbery; that petitioner was wearing a mask with only eye holes cut out and was carrying a small handgun; and that during a scuffle she pulled the mask off petitioner and was able to see his face. J.A. 15-16.

Henry's testimony was offered to corroborate eyewitness testimony that petitioner was the bank robber, J.A. 15-17. The prosecutor outlined the government's evidence that petitioner had borrowed a white Volkswagen shortly before the robbery, that a person matching the robber's description was seen in the same car on the morning of the robbery, that Christian had been in a white Volkswagen with its door open at the time of the robbery but had driven away after attracting the attention of the police, and that the robber had looked up and down the street outside the bank before commandeering the taxi van. Henry's testimony, the prosecutor suggested, would support the inference that petitioner was the robber and had planned to make his getaway in the white Volkswagen with Christian's assistance. See J.A. 17. The prosecutor also argued that similarities between the two robberies tended to identify petitioner as the bank robber. J.A. 16-17.

In connection with the incident at Henry's house, petitioner was charged under territorial law with burglary, attempted robbery, assault, and weapons offenses. He was tried for and acquitted of those offenses before his trial for the bank robbery began. J.A. 17, 21-22. However, the district judge, who had presided over petitioner's earlier trial for the Henry robbery, commented that petitioner "was not acquitted on the issue of identification." J.A. 21.

The court noted that petitioner's "presence in the house was not seriously contested in th[at] case" (J.A. 21).

Over petitioner's objection, the district court ruled that Henry's testimony was admissible. The court determined, by "clear and convincing evidence," that the evidence fell "within the ambit of" Rule 404(b) and that it was more probative than prejudicial. J.A. 25. Describing the proffered testimony as "classic circumstantial evidence," the district judge found that it was relevant "without any question." J.A. 24-25.[2] The court further found that it could avoid any prejudice arising from the introduction of the evidence "by pointing out to the jury that in that later instance [the trial involving the incident at Henry's house] Mr. Dowling was not convicted." J.A. 25.

Henry testified that two persons entered her house one morning in July 1985 and that "one of them was wearing a mask over their [*sic*] face" and carrying a "[b]lack silvery gun." J.A. 26-27. She also testified that she "raise[d] [the mask] half way and the person took it off and dump [*sic*] it on the table." J.A. 27. She identified petitioner as the person who was wearing the mask, and she testified that Delroy Christian was the man with petitioner that day. J.A. 28. No other details of the incident were elicited.[3]

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[2] The district court explained (J.A. 24):

> The discussion that we have just heard, while it deals with 404B also deals with a classic situation of circumstantial evidence insofar as it is sought to demonstrate through the Tutein vehicle being lent to Mr. Dowling, the presence of Mr. Delroy Christian in the Tutein vehicle and then earlier or later, rather, a relationship between Mr. Delroy Christian and Mr. Dowling. This is classic circumstantial evidence from which inferences are sought to be drawn.

[3] Petitioner's attorney did not cross-examine Henry. Petitioner took the stand and denied being involved with Christian in the incident at Henry's house. Pet. Br. App. 2a-4a.

When Henry left the stand, the district court instructed the jury about petitioner's acquittal of the robbery charges and the limited purpose for which Henry's testimony was being offered. J.A. 28. The court repeated that admonition in its final charge to the jury. J.A. 29. On the latter occasion, the court told the jury that it could consider Henry's testimony (*ibid.*):

> to the extent that it helps you in determining the identity of the person who committed the crimes at or near First Pennsylvania Bank on July 8, 1985. If it does not fall into that category, you may disregard it. [Petitioner] was found not guilty of the crime of robbery in connection with that.

3. The court of appeals concluded that Henry's testimony should have been excluded from evidence, but nevertheless affirmed petitioner's conviction. J.A. 40-49. Citing its decision in *United States* v. *Keller*, 624 F.2d 1154 (3d Cir. 1980), the court held that petitioner's acquittal of the charges arising from the robbery at Henry's home collaterally estopped the government from offering evidence of that incident in petitioner's bank robbery trial. J.A. 41-44.[4]

[4] The court rejected the government's contention that petitioner's acquittal on charges arising from the Henry robbery did not establish that he had not accompanied Christian to Henry's house, wearing a mask and carrying a gun. J.A. 42-43. Noting that no extrinsic evidence of the record of the prior trial had been submitted, the court of appeals found the trial court's observations that petitioner "was not acquitted on the issue of identification" and that his "presence in the house was not seriously contested" were "an insufficient basis on which to conclude that the issue of Dowling's participation in the robbery was not determined" (J.A. 43). "Even assuming that [petitioner's] identity and presence in Henry's house were not specifically disputed," the court continued, the government could not assert "that evidence concerning one element of an offense is separable for evidentiary purposes from a jury's general verdict of acquittal merely because it was not directly contradicted." J.A. 44.

The court of appeals reached the same conclusion under the rules of evidence. J.A. 44-45. Relying on *Huddleston* v. *United States*, 108 S. Ct. 1496 (1988), the court found that the robbery of Henry's home was not admissible under Rule 404(b) because "when the prior act sought to be introduced was the subject of an acquittal by a jury, a second jury should not be permitted to conclude 'that the act occurred and that the defendant was the actor.' " J.A. 44 (quoting 108 S. Ct. at 1501). Even if *Huddleston* did not require the exclusion of the evidence, the court of appeals continued, the prior acquittal had to be taken "to signify that it was not proven that [petitioner] committed the 'bad' act charged" and thus "the marginal relevance of the evidence was more than amply outweighed by the potential prejudice" under Fed. R. Evid. 403. J.A. 45.

The court of appeals concluded, however, that the admission of Henry's testimony was harmless error. J.A. 45-49. The court stated (J.A. 45) that it "need not in this case be convinced that the error was harmless beyond a reasonable doubt," the harmless error standard that applies to constitutional errors, see *Chapman* v. *California*, 386 U.S. 18 (1967). That standard was not applicable, the court held, because in the court's view the error was merely evidentiary and not of constitutional dimension. Instead, the court applied the standard of review that is applicable to non-constitutional errors, under which an error is deemed harmless if it is "highly probable" that the error did not affect the verdict (J.A. 46). See *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946). The court of appeals joined in the trial court's characterization of the evidence against petitioner as "overwhelming." J.A. 46. In addition, the court pointed out that the trial court had in-

structed the jury of the "limited value" of testimony regarding the incident at Henry's house and of petitioner's acquittal. J.A. 48. And, noting that evidence of a prior felony conviction was properly introduced to impeach petitioner at the bank robbery trial, the court found that "it is unlikely that the admission of the Henry testimony more than marginally affected the jury's overall character assessment of [petitioner]." J.A. 49. The court of appeals therefore concluded that "there is a 'high probability' that the error in admitting the Henry testimony did not prejudice [petitioner]." J.A. 49. Having rejected petitioner's other claims of error (J.A. 32-40), the court affirmed the conviction.

SUMMARY OF ARGUMENT

I. A. Petitioner's prior acquittal on charges arising from the incident at Henry's house did not bar the admission of Henry's testimony at the trial below. The prior acquittal represented only a determination that petitioner had not been proved guilty of the offenses charged beyond a reasonable doubt. In light of well-established collateral estoppel principles, that determination did not foreclose the lesser finding required for the introduction of Henry's testimony into evidence in this case. Under the Rules of Evidence, Henry's testimony was admissible if the jury could find, by a preponderance of the evidence, that petitioner accompanied Christian to her house while wearing a mask and carrying a gun. Since there was no inconsistency between that showing and petitioner's prior acquittal, collateral estoppel is inapplicable to this case.

The Court's decision in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), does not require a different conclusion. In *Ashe*, the State was attempting in a second prosecution to establish beyond a reasonable doubt a fact that a prior jury had

decided under the same standard of proof—specifically, a defendant's participation in the same robbery of which he had already been acquitted. It would be a very substantial extension of *Ashe* to hold that collateral estoppel or double jeopardy principles limit the evidence that may be admitted to prove an offense that is entirely separate from the one of which the defendant has been acquitted.

The Double Jeopardy Clause and its underlying values do not support that extension of *Ashe*. The guarantee against double jeopardy—and the values it expresses—are implicated only when a defendant is placed twice in "jeopardy" for "the same offence." U.S. Const. Amend. V. Admitting evidence of an offense of which a defendant has been acquitted to prove his guilt of a separate offense cannot fairly be characterized as putting the defendant in "jeopardy" twice for a single offense. The mere admission of evidence of acts that have been the subject of an earlier prosecution does not expose the defendant to a conviction or punishment for the acquitted offense, and it cannot be described as an attempt to retry him for that offense. Although the admission of that evidence may increase the likelihood that the defendant will be convicted of the new offense, the Double Jeopardy Clause does not protect defendants from the tendency of relevant evidence to make a guilty verdict more likely.

Judicial economy, the principal basis for the doctrine of collateral estoppel, provides even less reason to extend *Ashe*. In the criminal context, the public's interest in the accuracy and justness of criminal verdicts is more important than reducing congestion in court dockets. The unavailability to the government of remedies through which it can protect itself against erroneous acquittals also weighs heavily against the extension of collateral estoppel that petitioner advocates.

B. The Due Process Clause also does not require the exclusion of Henry's testimony. A rule that the government may not introduce any evidence of facts involved in a prior criminal prosecution, regardless of the basis for a defendant's acquittal, finds no support in the "goals of the criminal justice system" on which petitioner relies. The wholesale exclusion of probative evidence that petitioner advocates would undercut, rather than advance, the reliability of fact-finding in criminal trials. There is no inconsistency between a defendant's acquittal on a criminal charge and the admission of evidence relating to that charge to establish a separate offense. Even if there were such an inconsistency, the objective of consistency in jury verdicts is not a legitimate reason to exclude otherwise relevant evidence. There is no "tradition" that an acquittal of an offense precludes all future use of evidence tending to prove that offense, and petitioner has not even remotely demonstrated that requiring the exclusion of such evidence is among those " 'fundamental conceptions of justice which lie at the base of our civil and political institutions' * * * and which define 'the community's sense of fair play and decency.' " *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977).

II. Even if the Constitution prohibits the admission of evidence of facts determined by a prior acquittal, there would be two alternative grounds for affirming the conviction.

First, petitioner failed to carry his burden of proving the facts on which the prior acquittal was based. Collateral estoppel applies only to issues that have been actually and necessarily decided in favor of the party seeking to invoke the doctrine, and that party has the burden of establishing a record sufficient to permit a court to identify those issues. Petitioner submitted nothing by way of evidence or argument to suggest the basis for his prior acquittal. Based on his recollection, the trial judge found that petitioner's

presence at Henry's house was not contested at the earlier trial. Because the relevance of Henry's testimony turned on petitioner's presence in the house, and not whether he committed any crimes while he was there, petitioner failed to satisfy his burden of showing that the prior acquittal was based on a finding by the jury that is inconsistent with the purpose for which the evidence was offered below.

Second, under the facts of this case, any error in admitting the evidence was harmless beyond a reasonable doubt. Both lower courts properly characterized the case against petitioner as "overwhelming"; Henry's testimony occupied only a small role in establishing that petitioner was the robber; and other factors protected petitioner from suffering any significant prejudice from the admission of the evidence.

ARGUMENT

I. EVIDENCE OF PETITIONER'S INVOLVEMENT IN A PRIOR OFFENSE WAS ADMISSIBLE EVEN THOUGH PETITIONER WAS ACQUITTED OF THAT OFFENSE AT A PREVIOUS TRIAL

A. The Doctrine Of Collateral Estoppel Did Not Bar The Admission Of Evidence Regarding Conduct As To Which Petitioner Had Been Previously Acquitted

1. The doctrine of collateral estoppel provides generally that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States*, 440 U.S. 147, 153 (1979); see Restatement (Second) of Judgments § 27 (1982). Like res judicata, collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promot-

ing judicial economy by preventing needless litigation." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979). Although it was first developed in civil litigation, collateral estoppel has become "an established rule of federal criminal law." *Ashe* v. *Swenson*, 397 U.S. at 443.[5]

The doctrine of collateral estoppel is subject to a number of exceptions—"instances in which the policies against relitigation of an issue may be overcome." Restatement (Second) of Judgments 249 (1982). One of those exceptions is controlling in this case: Even when the requirements for an estoppel are otherwise present, relitigation is permitted when the party against whom preclusion is sought "had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action." *Id.* § 28(4). To apply collateral estoppel in that situation "would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed. • • • Since the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied." *Id.* at 281 comment f.[6]

This exception to the doctrine of collateral estoppel is most clearly applicable to acquittals in criminal cases. See Restatement (Second) of Judgments § 85 (1982). This Court has held on several occasions that an acquittal in a

[5] See *Sealfon* v. *United States*, 332 U.S. 575, 578 (1948); *United States* v. *Oppenheimer*, 242 U.S. 85, 87 (1916); *United States* v. *Adams*, 281 U.S. 202, 205 (1930).

[6] This exception could also be justified by the principle that collateral estoppel applies only to facts that were "actually and necessarily determined." *Montana* v. *United States*, 440 U.S. at 153. A jury that has resolved an issue against a party that faces a lower standard of proof in a second proceeding cannot be said to have "actually and necessarily" resolved the issue under that lesser standard.

criminal case does not estop the government from relitigating an issue when it is presented in a subsequent civil action governed by a lower standard of proof.

In *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984), for instance, a defendant had been acquitted of dealing in firearms without a license. Thereafter, the government sought the forfeiture of weapons seized from the defendant, alleging that they had been used in the criminal offense of which the defendant had been acquitted. This Court unanimously rejected the defendant's contention that collateral estoppel precluded relitigation of the question whether he had committed the offense. The Court explained that an acquittal on criminal charges "does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt." 465 U.S. at 361. Thus, "the jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that [the defendant] was engaged in an unlicensed firearms business" (*id.* at 362). And it was "clear," the Court concluded, "that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel" (*ibid.*). Accord *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235 (1972) ("The acquittal of the criminal charges may have only represented ' "an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." ' • • • As to the issues raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings."); *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938) ("The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*. The acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the

guilt of the accused.' • • • It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled."); *Lewis* v. *Frick*, 233 U.S. 291, 302 (1914); *Murphy* v. *United States*, 272 U.S. 630, 632-633 (1926); *Stone* v. *United States*, 167 U.S. 178, 188 (1897).

The same reasoning controls this case. Petitioner's prior acquittal on the charge of robbing Henry was not a determination that petitioner had not been present in Henry's house with Christian, wearing a mask and carrying a gun. Rather, it merely signified "the existence of reasonable doubt as to his guilt." *89 Firearms*, 465 U.S. at 361.[7] The admissibility of Henry's testimony in this case was governed by a much lower standard of proof. Under *Huddleston* v. *United States*, 108 S. Ct. 1496, 1501 (1988), the district court was entitled to admit the testimony based on no more than a determination that the "jury could reasonably find • • • by a preponderance of the evidence" that petitioner was the masked intruder who had been at Henry's house with Delroy Christian.[8] The relation between this standard of proof and the standard applied in petitioner's prior criminal trial was exactly the same as in the successive proceedings in *89 Firearms*. The doctrine of collateral estoppel is equally inapplicable in both contexts. See J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[10], at 404-74, ¶ 803(22)[01], at 803-360 n.48 (1988); Note, *Evidentiary Use of Prior Acquitted Crimes: The "Relative Burdens of Proof" Rationale*, 64 Wash. U.L.Q. 189 (1986).

These principles suggest that collateral estoppel should apply against the government in a criminal case only where the government seeks to prove beyond a reasonable doubt a fact that was resolved in the defendant's favor under that standard by a prior acquittal. In this case, for example, the government was trying to prove beyond a reasonable doubt that petitioner was the person who robbed the bank. If petitioner had previously been acquitted of a related charge, such as assaulting one of the bank tellers during the course of the robbery, and if it was clear from the record that the acquittal was based on the jury's conclusion that petitioner was not the person who robbed the bank, collateral estoppel would prohibit the government from attempting to prove in a subsequent bank robbery prosecution that petitioner was the robber. That conclusion follows from the fact that the government's burden with respect to the issue of the robber's identity is the same in both cases – proof beyond a reasonable doubt. But col-

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[7] Petitioner argues that it is "not unreasonable to interpret an acquittal as reflecting a finding of innocence by the jury." Pet. Br. 42. Even if that contention were not foreclosed by this Court's cases, it would have little to recommend it. The only point on which jurors must agree to return a verdict of not guilty – and the only finding such a verdict "necessarily" reflects – is that the government failed to prove its case beyond a reasonable doubt. Even if one or more members of a jury entertained a belief that the government's proof failed to meet some lesser standard, that belief would not be recorded in the collective jury verdict. It is also fair to assume that in practice juries rarely reach a collective determination that a defendant is entirely innocent of an offense. Jury instructions routinely admonish jurors to adhere to the reasonable doubt standard, and defense counsel vigorously reinforce that message in their closing arguments. Jurors striving toward unanimity in favor of an acquittal undoubtedly focus their attention on the issue of reasonable doubt.

[8] Because the trial in this case preceded the Court's decision in *Huddleston*, the trial court actually determined the admissibility of the evidence by the more exacting "clear and convincing evidence" standard that some courts had applied to "other acts" evidence offered under Rule 404(b). J.A. 25. See 108 S. Ct. at 1499 n.2.

lateral estoppel should not apply where the fact that the evidence in the second case is offered to prove is not one that the government is required to establish beyond a reasonable doubt. Because the government was not required in the instant case to prove beyond a reasonable doubt that petitioner was the person who accompanied Delroy Christian to Henry's house, the verdict of acquittal at the first trial should not bar the admission of that evidence on collateral estoppel grounds.

To hold that collateral estoppel bars the introduction of evidence of facts as to which a jury has found a reasonable doubt would in effect establish a different standard of relevance for that evidence than for any other evidence. To illustrate, if a witness in the bank had been prepared to testify that he believed petitioner was the robber but was not sure of his identification beyond a reasonable doubt, that testimony would clearly have been admissible. Under the Rules of Evidence, the "evidentiary standard [of proof] is unrelated to the burden of proof on the substantive issues" in a criminal case. *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987). The Rules recognize that "[t]he sum of an evidentiary presentation may well be greater than its constituent parts." *Id.* at 180. Henry's testimony should be treated no differently. It met the standard of relevance applicable to evidence generally, and its admission was consistent with well-established principles of collateral estoppel.

2. This Court's decision in *Ashe* v. *Swenson* does not require a different conclusion. In that case, the State was seeking to prove a fact—the defendant's participation in a single robbery of members of a poker game—that was subject to the same reasonable doubt standard in successive prosecutions. In the first of those prosecutions, the State tried Ashe on the charge of robbing Knight, one of six members of the game. Ashe was acquitted. The State

then tried Ashe on the charge of robbing another member of the same game, and it obtained a conviction. This Court reversed the conviction, holding that the doctrine of collateral estoppel embodied in the Double Jeopardy Clause barred relitigation of the issue whether Ashe was one of the men who had robbed the game. The Court explained (397 U.S. at 445):

> the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. [Collateral estoppel], therefore, would make a second prosecution for the robbery • • • wholly impermissible.

Ashe thus held that the State could not bring a second prosecution for the robbery of a second victim at the poker game. The case did not present the question whether the State could use evidence that Ashe had been a participant in the robbery for a different purpose—for example, as evidence in a trial for an entirely separate offense. Therefore, as petitioner acknowledges (Pet. Br. 26-27), *Ashe* did not address the question presented by this case.[9]

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[9] Because it is based on the Double Jeopardy Clause, *Ashe* necessarily relied on the premise that the robbery of the second poker player was in a sense the "same offense" as the robbery of the first. Indeed, this Court subsequently explained that because of the close relationship between the two crimes, the Court considered them to be the "same offense" for purposes of the constitutional protection against double jeopardy, even though each required proof of a fact that the other did not—*i.e.*, that a different individual had been robbed. See *Brown* v. *Ohio*, 432 U.S. 161, 166-167 n.6 (1977). Obviously, the offenses involved in the present case and in the prior robbery of Henry cannot be considered to be the "same offense" under any standard.

Petitioner asks the Court to apply *Ashe* to foreclose the prosecution from introducing evidence to prove, for any purpose, a fact as to which the jury in an earlier criminal case entertained a reasonable doubt. For the Court to do so, however, would "significantly expand[ ] the *Ashe* holding." *Blackburn* v. *Cross*, 510 F.2d 1014, 1017 (5th Cir. 1975). We submit that the considerations underlying the decision in *Ashe* do not support that extension.

As petitioner points out, a number of courts of appeals have found support in *Ashe* for that extension of the doctrine of collateral estoppel.[10] Those courts have attached great weight to *Ashe*'s general observation that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" (397 U.S. at 443).[11]

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[10] Before *Ashe*, an overwhelming majority of the courts to consider the issue held that an acquittal did not prohibit the use of evidence of an offense in a subsequent prosecution for a separate offense. See Annotation, *Admissibility of Evidence As to Other Offense As Affected by Defendant's Acquittal of That Offense*, 86 A.L.R.2d 1132 (1962); Note, *Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted*, 2 Fla. St. U.L. Rev. 511, 522 (1974).

[11] *United States* v. *Gonzalez-Sanchez*, 825 F.2d 572, 583-584 (1st Cir.), cert. denied, 108 S. Ct. 510 (1987); *United States* v. *Mespoulede*, 597 F.2d 329, 332 (2d Cir. 1979); *Wingate* v. *Wainwright*, 464 F.2d 209, 212 (5th Cir. 1972); *United States* v. *Mock*, 604 F.2d 341, 343 (5th Cir. 1979); *De La Rosa* v. *Lynaugh*, 817 F.2d 259, 263 (5th Cir. 1987); *United States* v. *Whitaker*, 702 F.2d 901, 903 (11th Cir. 1983); *Albert* v. *Montgomery*, 732 F.2d 865, 869 (11th Cir. 1984); *United States* v. *Gornto*, 792 F.2d 1028, 1031 (11th Cir. 1986); *United States* v. *Day*, 591 F.2d 861, 868 (D.C. Cir. 1978).

The Third Circuit, as its decision in this case reflects (J.A. 45-46), apparently does not understand the application of collateral estoppel to

That shorthand characterization of the rule of collateral estoppel cannot fairly be read to have swept away the recognized exceptions to the doctrine. In particular, the Court's decisions in *89 Firearms, One Lot Emerald Cut Stones*, and *Helvering* v. *Mitchell* make it clear that issues of ultimate fact resolved by a valid and final judgment in a criminal case *can* again be litigated in a subsequent civil lawsuit governed by the preponderance of the evidence standard—notwithstanding *Ashe*'s reference to "any future lawsuit."[12] Several federal courts of appeals have refused to apply collateral estoppel to foreclose the introduction of evidence of offenses of which a defendant has been acquitted.[13] And the better reasoned cases at the state

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this type of case to involve the constitutional principles recognized in *Ashe*. See *United States* v. *Keller*, 624 F.2d at 1157-1160.

The Sixth Circuit has not made clear what it regards as the source of its rule foreclosing the use of evidence in the second of two criminal trials. Compare *United States* v. *Johnson*, 697 F.2d 735, 739-741 (1983), with *Rice* v. *Marshall*, 816 F.2d 1126, 1130 (1987).

[12] Petitioner's reliance (Pet. Br. 38) on *Ashe*'s quotation from *United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961), is also misplaced. The principal authority for the statement quoted from *Kramer* was the Court's decision in *Coffey* v. *United States*, 116 U.S. 436, 442-443 (1886), a decision that the Court overruled in *89 Firearms*. 465 U.S. at 361. In light of that development, *Kramer* is no longer good law to the extent that it suggested that a difference between the standards of proof in successive proceedings is immaterial to the application of collateral estoppel. *Ashe*'s reliance on *Kramer* must be viewed as similarly qualified.

[13] *United States* v. *Kills Plenty*, 466 F.2d 240 (8th Cir. 1972), cert. denied, 410 U.S. 916 (1973); *United States* v. *Riley*, 684 F.2d 542, 546 (8th Cir. 1982), cert. denied, 459 U.S. 1111 (1983); *Flittie* v. *Solem*, 775 F.2d 933, 942 (8th Cir. 1985), cert. denied, 475 U.S. 1025 (1986); *United States* v. *Castro-Castro*, 464 F.2d 336 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973); *United States* v. *Rocha*, 553 F.2d 615, 616 (9th Cir. 1977); *United States* v. *Van Cleave*, 599 F.2d 954, 957

court level have recognized that the difference in the burdens of proof applicable to the trial of an offense and to the introduction of evidence of acts relevant to the offense in a later prosecution for a separate offense makes *Ashe* inapplicable in a case like this one.[14]

In short, we believe that the constitutional rule in *Ashe* does not require an expansion of the principles of collateral estoppel as they apply to criminal cases. Thus, *Ashe* applies only to cases in which the government seeks to prove beyond a reasonable doubt a fact resolved in the defendant's favor under that standard by a prior acquittal. It is only in that situation that traditional principles of collateral estoppel would foreclose relitigation of an issue. That limitation on the scope of *Ashe* is also compelled by the constitutional theory on which *Ashe* is based, because unless two offenses are sufficiently similar as to require proof of a common fact beyond a reasonable doubt, they cannot conceivably be characterized as the "same offense" for purposes of the Double Jeopardy Clause. See *Brown* v. *Ohio*, 432 U.S. at 166-167 n.6. There is no textual, historical, or other basis for extending the prohibition on double jeopardy to a second prosecution that lacks even that connection to a prior criminal proceeding.

(10th Cir. 1979); *Holt* v. *United States*, 404 F.2d 914 (10th Cir. 1968), cert. denied, 393 U.S. 1086 (1969).

[14] See *State* v. *Smith*, 271 Or. 294, 296, 532 P.2d 9, 10 (1975); *State* v. *Fielders*, 124 N.H. 310, 313-314, 470 A.2d 897, 898-900 (1983).

Although decisions of the federal courts of appeals have largely deprived state courts of their freedom of choice on this issue, a clear majority of the state courts that have spoken to the question before or after *Ashe* have the permitted use of evidence of conduct relevant to an offense of which a defendant has been acquitted. See Annotation, *Admissibility of Evidence As to Other Offense As Affected by Defendant's Acquittal of That Offense*, 25 A.L.R.4th 934 (1983).

3. Petitioner argues (Pet. Br. 31, 32-34) that his proposed extension of *Ashe*, even if not compelled by the Double Jeopardy Clause itself, is consistent with the values that underlie that Clause. He argues that to permit the introduction of evidence such as Henry's testimony would violate the "underlying idea" of the protection against double jeopardy, which is:

> that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States*, 355 U.S. 184, 187 (1957). Similarly, petitioner contends that admitting evidence of an offense of which a defendant has been acquitted allows "the state to utilize an initial trial as a 'dry run for a subsequent one' " (Pet. Br. 31 (quoting *Ashe* v. *Swenson*, 397 U.S. at 447)), that it amounts to a "[retrial] for the same conduct" (Pet. Br. 34), and that it places him in "jeopardy" for the acquitted offense (Pet. Br. 36-37 & nn.37-38).

All of these arguments suffer from the same basic flaw. The Double Jeopardy Clause prohibits subjecting a defendant "for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. Thus, the values it expresses reach only the situation in which a defendant can fairly be described as being threatened with "jeopardy" for an offense on which he has earlier been tried. They cannot justify reworking the prohibition against successive prosecutions for a single offense into a rule restricting the admissibility of evidence in prosecutions for entirely separate offenses.

The Court's cases have defined "jeopardy" in a way that makes that concept completely inapplicable to a defendant's mere exposure to evidence of an offense for which he is not on trial. The risk to which the term "jeopardy" refers "is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.'" *Breed* v. *Jones*, 421 U.S. 519, 529 (1975) (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-549 (1943)). "Without risk of a determination of guilt, jeopardy does not attach." *Serfass* v. *United States*, 420 U.S. at 391-392. Contrary to petitioner's suggestion, the bank robbery trial did not expose petitioner to any "risk" of conviction or punishment for any offenses arising from the incident at Henry's house. Rather, he faced only the risk that the jury would find Henry's testimony credible and rely on it in inferring that petitioner was the masked robber at the bank. In that respect, Henry's testimony was no different from any other evidence that could have been introduced to identify petitioner as the bank robber.

The policies underlying the Double Jeopardy Clause do not protect a defendant from the likelihood that relevant evidence will contribute to a conviction—or from any "embarrassment," "expense," "ordeal," "anxiety," and "insecurity" (*Green* v. *United States*, 355 U.S. at 187) that may accompany that prospect. And, by the same token, the mere evidentiary use of prior conduct of which a defendant has been acquitted does not threaten the type of official oppression at which the Double Jeopardy Clause was aimed. The admission of such evidence in cases like this one does not involve "repeated attempts to convict an individual for an alleged offense" (*Green* v. *United States*, 355 U.S. at 187), for the simple reason that at the trial in this case, petitioner was not exposed to conviction for the Henry robbery.

Petitioner's double jeopardy argument is based on the premise that the introduction of Henry's testimony about petitioner's appearance with Christian at her house, which was admitted for the sole purpose of identifying petitioner as the person who robbed the First Pennsylvania Bank, is indistinguishable in constitutional terms from the inclusion of a separate count charging petitioner for a second time with offenses arising from the incident at Henry's house. That premise is invalid, and with it falls petitioner's reliance on the policies underlying the Double Jeopardy Clause.

4. Petitioner also invokes the values underlying the doctrine of collateral estoppel to support his argument for an extension of *Ashe*. Pet. Br. 31-32, 33. It is anomalous to suggest, however, that those values would now justify abrogating the long-established exception to the doctrine on which we rely. In any event, the policies underlying the doctrine of collateral estoppel—the avoidance of duplicative litigation, judicial economy, and the avoidance of inconsistent judgments—cannot support giving an acquittal more preclusive effect in criminal proceedings than *89 Firearms* prescribes for civil proceedings.

To the contrary, the differences between criminal and civil cases weigh in favor of a cautious application of collateral estoppel in the criminal context, not a broader application. That point is well illustrated by *Standefer* v. *United States*, 447 U.S. 10 (1980), in which this Court refused to extend the doctrine of non-mutual collateral estoppel to criminal cases, because of special consideration applicable in the criminal context.[15] Because the

[15] In *Standefer*, a defendant charged with aiding and abetting a criminal offense argued that the alleged principal's acquittal estopped the government from relitigating, in the aider and abettor's trial, the question whether the principal had committed that offense. In one respect, the argument for the application of collateral estoppel was

government in criminal cases does not enjoy the rights available to other litigants to correct jury verdicts that are against the evidence or based on "passion and prejudice," the Court held that collateral estoppel must be applied more sparingly against the government in criminal cases than in private civil litigation. *Id.* at 23. The absence of a "full and fair opportunity to litigate," the Court explained, "strongly militates against giving an acquittal preclusive effect." *Ibid.*[16] A criminal case also "involves 'competing policy considerations' that outweigh the economy concerns that undergird the estoppel doctrine." 447 U.S. at 25. " 'The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases * * *. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interests of the courts, nor the public.' " *Ibid.*

All of these factors weigh against the extension of the *Ashe* case that petitioner advocates here. Moreover, they answer petitioner's contention (Pet. Br. 23 & n.24, 37-38) that a criminal judgment is entitled to more preclusive

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substantially stronger in *Standefer* than it is here; in *Standefer* the government was attempting in the second trial to prove beyond a reasonable doubt a fact—the principal's participation in the offense—as to which the prior jury had necessarily found a reasonable doubt. The Court nevertheless refused to preclude the government from relitigating the principal's actions in the alleged aider and abettor's trial.

[16] See *Montana* v. *United States*, 440 U.S. at 164 n.11 ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."); Restatement (Second) of Judgments § 28(1) (1982) (collateral estoppel does not apply where "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action").

effect in a subsequent criminal case than in the civil proceedings at issue in *89 Firearms*.

5. Finally, relying on what he describes as a "long established common law principle" that evidence admitted under Fed. R. Evid. 404(b) "is not favored" (Pet. Br. 35), petitioner argues that the constitutional doctrine of collateral estoppel should be extended so as to "minimize the possibility that a jury will decide a defendant's guilt on the basis of extraneous and prejudicial other crimes evidence" (*id.* at 36-37). Petitioner's analysis ignores the fact that the Federal Rules of Evidence are congressionally mandated directions to the courts that specify the extent to which such evidence is or is not admissible and provide the means for dealing with any potential prejudice. The Rules are not general policy statements that can be overridden when other competing policies or "common law principles" seem more appealing. Just as clearly, those principles cannot be used to manipulate other doctrines, such as collateral estoppel, with the goal of producing results different from those that the Rules of Evidence prescribe.[17]

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[17] Any attempt to draw a sharp line between the category of evidence encompassed by Rule 404(b) and other relevant evidence is inherently artificial. In this case, for instance, Henry's testimony was introduced not only to prove that petitioner had engaged in a "similar act" after the bank robbery, but also as "classic circumstantial evidence" (J.A. 24) linking him with Christian. Assuming that a special rule of collateral estoppel were justified for "other acts" evidence, it is uncertain whether it would be applicable to this case.

Moreover, although collateral estoppel is often invoked in response to an attempt to introduce evidence of similar acts under Fed. R. Evid. 404(b), disputes over its applicability are not limited to that context. Courts have sometimes held that collateral estoppel is applicable when a defendant is acquitted on certain counts in an indictment, and a second trial is necessary on others because of a severance, a mistrial, or a conviction followed by a reversal on appeal that permits retrial. See, *e.g.*, *United States* v. *Corley*, 824 F.2d 931 (11th Cir. 1987); *United*

In *Huddleston*, this Court rejected the notion that the potential prejudice that may accompany "other acts" evidence justifies subjecting that evidence to a special standard of relevance. That argument, the Court said, is "inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b)." 108 S. Ct. at 1500. The Court explained that a defendant's protection against prejudice was to be found in "four other sources" recognized by the rules: Rule 404(b)'s requirement that the evidence be admitted for a proper purpose; the requirement of relevancy applicable to all evidence; Fed. R. Evid. 403, which permits the exclusion of evidence whose probative value is substantially outweighed by its prejudicial effect; and jury instructions limiting the jury's consideration of evidence to the purpose for which it was properly admitted. 108 S. Ct. at 1502.

Those same evidentiary principles are sufficient to protect defendants from any prejudice that may accompany evidence that pertains to offenses of which the defendant has been acquitted. And, by contrast with petitioner's sweeping rule of absolute exclusion, they provide far more discriminating means for courts to accommodate the general principle that all relevant evidence should be admissible (see Fed. R. Evid. 402) with the defendant's interest in avoiding unfair prejudice.

This case illustrates the effectiveness of the techniques that are available to trial judges under the Rules of Evidence. The trial court addressed the admissibility of Henry's testimony before trial and specifically found both that it was relevant to the issue of the bank robber's

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States v. *Mespoulede*, 597 F.2d at 336-337. But see, *e.g.*, *United States* v. *Smith*, 337 A.2d 499, 501-503 (D.C. 1975). Our view is that collateral estoppel should play no role in such cases. See *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984).

identity and that its probative value outweighed its prejudicial effect. The court admonished the prosecutor to limit Henry's testimony to the particulars tending to show that petitioner was the bank robber—his presence in Henry's house with Christian and the fact that petitioner was wearing a mask and carrying a gun. Both when Henry testified and when the court delivered its final jury charge, the court advised the jury of petitioner's acquittal and of the limited purpose of the testimony. Protective measures of that kind are sufficient to guard against prejudice arising from evidence encompassed by Rule 404(b), even if the evidence relates to offenses of which the defendant has been acquitted.

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In conclusion, the doctrine of collateral estoppel, the Double Jeopardy Clause, and the values each expresses were no obstacle to the admission of Henry's testimony. The verdict in petitioner's trial for offenses arising from the incident at Henry's house determined only that petitioner was not proved guilty beyond a reasonable doubt. That determination did not foreclose the showing of relevance needed to admit Henry's testimony in this case, which was governed by a lower standard of proof. The government did not, as in *Ashe*, seek to prove beyond a reasonable doubt a fact that had been determined in petitioner's favor under that standard. The admission of Henry's testimony did not place petitioner in "jeopardy" for offenses of which he had been acquitted or otherwise implicate the values underlying the Double Jeopardy Clause. The admission of the evidence was thus governed solely by the Rules of Evidence. The trial court scrupulously adhered to the terms of those Rules, and it took a variety of steps to protect petitioner from the possibility that jurors might employ the evidence for a purpose pro-

hibited by Fed. R. Evid. 404(b) or might entertain a mistaken impression as to the disposition of those charges.[18] The court of appeals erred when it held that the prior acquittal foreclosed the admission of the evidence, and petitioner's conviction should be upheld on that ground.

B. The Due Process Clause Does Not Bar The Admission Of Evidence Of Offenses Of Which A Defendant Has Been Acquitted

Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has very limited operation. As the Court observed in *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977):

> Judges are not free, in defining "due process," to impose on law enforcement officials [their] "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." *Rochin* v. *California*, 342 U.S. 165, 170 (1952). * * *

[18] To be sure, the court of appeals held, in the alternative, that Henry's testimony was inadmissible under the Rules of Evidence, either because it was not relevant or because its prejudicial effect outweighed its probative value. J.A. 44-45. However, the court's reasoning makes it clear that those determinations embodied the same error concerning the effect of the prior judgment as the court's ruling on collateral estoppel. The court's finding on relevance was based on its view that, after petitioner's acquittal, "a second jury should not be permitted" to conclude that petitioner was the intruder at Henry's house. J.A. 44. Likewise, the court of appeals' balance of probative value and prejudice reflected its view that "the jury's verdict in the Henry occurrence must be taken to signify that it was not proven that [petitioner] committed the 'bad' act charged." J.A. 45. Because the court's purported evidentiary rulings depended on the same mistaken assessment of the effect of petitioner's acquittal as the court's ruling on collateral estoppel, those rulings cannot stand as an alternative basis for excluding the evidence.

> [They] are to determine only whether the action complained of * * * violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), and which define "the community's sense of fair play and decency," *Rochin* v. *California*, *supra*, at 173.

Petitioner argues that due process prohibits the use of *any* evidence that tends to prove an offense of which a defendant has been acquitted, regardless of the theory of defense that prevailed in the first trial—an inquiry that petitioner downplays as "the often convoluted collateral estoppel analysis." Pet. Br. 23; see *id.* at 14 n.18. This contention is strikingly broad in two respects: it would attribute to the Due Process Clause a limitation on successive prosecutions that is not even remotely grounded in principles of double jeopardy, and it would forgo even the analysis that *Ashe* found necessary to bar relitigation of issues in a criminal case. Petitioner cannot establish that this type of broad immunity from probative evidence is a "fundamental" aspect of fair criminal proceedings or that it is mandated by the "goals of the criminal justice system" that he invokes. Pet. Br. 15, 18.

1. The evidentiary immunity petitioner advocates would undercut, rather than advance, the reliability of fact-finding in criminal trials. See Pet. Br. 18-19. First, it would exclude even evidence on which a verdict of acquittal casts no doubt whatever. In this case, for instance, petitioner's rule would have required the exclusion of Henry's testimony even if a careful review of the record of his prior trial had established that he had been acquitted on some ground other than his not having been present with Christian in Henry's house. There is no legitimate, let alone "fundamental," interest in the exclusion of testimony and physical evidence whose probative value is not even in question as a result of a prior acquittal.

Second, even if it were limited to facts as to which a jury has demonstrably entertained a reasonable doubt in an earlier prosecution, petitioner's proposed rule would undercut the reliability of the fact-finding process. Criminal trials are conducted on the well-founded assumption that reliable fact-finding is most likely to occur when "[a]ll relevant evidence is admissible." Fed. R. Evid. 402. If evidence meets the test of relevance, and if its admission would not violate a privilege or other legal right, doubts about reliability are resolved by allowing the opposing party to cross-examine, to submit countervailing evidence, and to argue against the inferences that the other party's evidence is said to support. Petitioner's proposed rule, by contrast, would deny the jury any opportunity to consider evidence that meets the test of admissibility applicable to all other proof. Petitioner's rule is therefore contrary to the principal guarantee of reliable fact-finding—permitting the jury to hear from both sides all of the facts that may assist it in reaching a verdict.

Contrary to petitioner's suggestion (Pet. Br. 18-19), the admission of evidence that resulted in an acquittal at an earlier trial is not analogous to the use at trial of a void conviction. When a conviction is used at trial, whether to trigger a recidivist statute or to impeach credibility in accordance with Fed. R. Evid. 609, it is conclusive as to the fact of the conviction and the defendant's guilt of the crime.[19] The defendant has no opportunity to prove that he did not commit the offense. Evidence that resulted in an earlier acquittal, by contrast, is not conclusive on any point, but is subject to challenge by the defendant by any appropriate means.

[19] See Rule 609 Advisory Committe note, 28 U.S.C. App. at 703 ("As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act.").

Moreover, when a prior conviction is void for constitutional reasons, such as the defendant's lack of representation by counsel at trial, the conviction is considered factually unreliable, since it was not the product of a constitutionally fair adjudication. That problem of reliability is inapplicable to evidence of the sort involved in this case. The jury was free to assess the truthfulness and the significance of Henry's testimony, and petitioner was free to attempt to show that the evidence was either false or insignificant. Nor did the process of obtaining that testimony involve any error that could have irreparably undercut its reliability. See *Simmons* v. *United States,* 390 U.S. 377, 384 (1968) (due process bars the admission of in-court identification only if impermissibly suggestive pretrial identification procedures gave rise to "very substantial likelihood of irreparable misidentification").

Finally, reliance on a conviction that is invalid because it was obtained when the defendant was unrepresented "erodes the principle" that a defendant is entitled to counsel and requires him to "suffer[ ] anew from the deprivation of that * * * right." *Burgett* v. *Texas,* 389 U.S. 109, 115 (1967). See *Loper* v. *Beto,* 405 U.S. 473, 481 (1972) (plurality opinion); *United States* v. *Tucker,* 404 U.S. 443, 449 (1972). By contrast, in this case the government did not obtain Henry's testimony through any violation of petitioner's constitutional rights; the exclusion of the evidence in this case is therefore not required in order to avoid perpetuating the effects of a prior constitutional violation.[20]

[20] Contrary to petitioner's claim (Br. 19-20), the admission of Henry's testimony had no effect whatever on the government's burden of proving petitioner guilty of the bank robbery beyond a reasonable doubt, and thus no tendency to increase the likelihood of an erroneous conviction for that offense. See generally *In re Winship,* 397 U.S. 358 (1970); *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975).

2. Petitioner's proposed rule cannot be justified by the "goal of consistency in jury verdicts." Pet. Br. 20. At the outset, there is no inconsistency between petitioner's acquittal on the charge of robbing Henry and a conviction on the charges in this case, even though his conviction may have been based in part on the evidence that he accompanied Christian to Henry's house wearing a mask and carrying a gun. The bank robbery conviction did not entail any judgment by the jury with respect to offenses that may have occurred at Henry's house, since the jury in this case made no collective finding as to petitioner's guilt or innocence of robbing Henry. Their only joint determination—that petitioner was guilty beyond a reasonable doubt of offenses associated with the bank robbery—was neither foreclosed by, nor inconsistent with, the prior not guilty verdict.

Even if the verdict in this case were inconsistent with petitioner's prior acquittal, the Court's cases establish that inconsistency in jury verdicts is a fact of life in the criminal justice system, not a basis for creating new rights for criminal defendants. *Standefer* v. *United States, supra; United States* v. *Powell,* 469 U.S. 57 (1984). In *Standefer,* the Court refused to vacate a conviction on a charge of aiding and abetting an alleged offense even though a different jury had acquitted the principal. The Court explained that this result was consistent with the "appearance of justice" and continued (447 U.S. at 25):

> This case does no more than manifest the simple, if discomforting, reality that "different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." *Roth* v. *United States,* 354 U.S. 476, 492, n.30 (1957). While symmetry of results may be intellectually satisfying, it is not required.

Similarly, in *United States* v. *Powell*, the Court reaffirmed the "established principle" that inconsistency in a jury's verdicts on separate counts in an indictment does not warrant disturbing convictions on the counts as to which the jury returned guilty verdicts. 469 U.S. at 63.[21]

3. Finally, petitioner contends that the introduction of evidence of an offense of which the defendant has been acquitted violates "commonly accepted notions of fair play," a "tradition * * * that a person tried and acquitted of a crime should not again be forced to defend that accusation in a subsequent criminal proceeding," and "fundamental notions of fairness." Pet. Br. 16-17, 24-25. To the extent that those concerns are of constitutional magnitude, however, they are fully expressed in the Double Jeopardy Clause. The Due Process Clause is not a device for freely extending the prohibition against double jeopardy to cases involving only the admission of the same evidence in two successive criminal proceedings.

Before the Court held the Double Jeopardy Clause applicable to the States through the Fourteenth Amendment (see *Benton* v. *Maryland*, 395 U.S. 784 (1969)), due process was held to prohibit only those successive prosecutions that subjected a defendant to "a hardship so acute and shocking that our polity will not endure it." *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937). Moreover, the judgment as to whether a second prosecution was fundamentally unfair was not decided in terms of "any over-all

[21] The Court explained that inconsistent verdicts "should not necessarily be interpreted as a windfall to the Government at the defendant's expense," that "the Government has no recourse if it wishes to correct the jury's error," that jury verdicts may reflect the exercise of lenity, and that criminal defendants are afforded protection "against jury irrationality or error" by the courts' review of the sufficiency of the evidence of guilt. 469 U.S. at 64-67. In light of those factors, the Court held, the "best course to take is simply to insulate jury verdicts from review on this ground." *Id.* at 68-69.

formula"—*i.e.*, in terms of broad rules like the one proffered by petitioner—but rather " 'in the facts and circumstances of each case.' " *Hoag* v. *New Jersey*, 356 U.S. 464, 468 (1958) (quoting *Brock* v. *North Carolina*, 344 U.S. 424, 427-428 (1953)). Under these tests, due process was held to permit state prosecutions that would have been flatly prohibited by the Double Jeopardy Clause. In fact, in *Hoag*, a case with facts indistinguishable from those of *Ashe* v. *Swenson*, the Court expressed "grave doubts whether collateral estoppel can be regarded as a constitutional requirement." 356 U.S. at 471.

Those decisions were overruled when the Court "incorporated" the guarantee against double jeopardy in the Due Process Clause of the Fourteenth Amendment. However, they foreclose petitioner's contention that notions of "fundamental fairness" provide more protection from successive prosecutions than is guaranteed by the Double Jeopardy Clause. As *Lovasco* reflects, the standard that the Court applied in *Palko*, *Hoag*, and *Brock* is still the test applicable to claims, like petitioner's, that cannot be brought under one of the specific guarantees in the Bill of Rights.[22] Petitioner cannot satisfy that test on the facts of this case.

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[22] In *Showery* v. *Samaniego*, 814 F.2d 200, 204 (1987), the Fifth Circuit "decline[d] to find the collateral estoppel doctrine cognizable as a constitutional claim apart from those claims that are recognized under the double jeopardy clause." In *Showery*, the State had failed to carry its burden at a bond revocation hearing of showing by a preponderance of the evidence that a defendant had committed an offense while free on an appellate bond. The defendant argued that under the doctrine of collateral estoppel that determination should bar the State from prosecuting him for that offense. The court rejected that contention. But cf. *United States ex rel. DiGiangiemo* v. *Regan*, 528 F.2d 1262, 1265-1266 (2d Cir. 1975) (due process requires State to give collateral estoppel effect to determination that evidence was obtained through a violation of the Fourth Amendment), cert. denied, 426 U.S. 950 (1976).

Rather than reflecting an "acute and shocking" form of unfairness, the admission of the Henry evidence in this case actually promoted the interest in fair and evenhanded adjudication. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). The public has a paramount interest in "prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969).

Petitioner makes no serious effort to demonstrate that a rule excluding all evidence relevant to an offense of which a defendant has been acquitted occupies any place in the traditions of fairness that have grown up around a criminal trial or that such a rule could be regarded as "fundamental" in the sense required by the Due Process Clause.[23] Recognition of such a rule would undercut the reliability of fact-finding in criminal cases by excluding relevant evidence, it would subordinate the goal of just judgments in criminal cases to a misplaced concern for consistency in jury verdicts, and it would miscast the values that support a ban on successive prosecutions for a single offense as the basis for a transactional evidentiary immunity in successive prosecutions for different offenses.

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[23] In fact, before *Ashe*, the proposition that an acquittal did not bar introduction of evidence of an offense was "upheld by the great weight of authority throughout the country." *State* v. *Yormark*, 117 N.J. Super. 313, 337, 284 A.2d 549, 560 (1971) (citing many cases). See Annotation, 86 A.L.R.2d 1132.

II. EVEN IF THE CONSTITUTION PROHIBITS THE ADMISSION OF EVIDENCE OF AN OFFENSE OF WHICH A DEFENDANT HAS BEEN ACQUITTED, PETITIONER'S CONVICTION SHOULD BE AFFIRMED

If the Court concludes that Henry's testimony should have been excluded, it could reach that conclusion on either constitutional or nonconstitutional grounds. If the Court rejects petitioner's constitutional contentions but concludes that Henry's testimony should have been excluded on nonconstitutional grounds, petitioner's conviction would have to be affirmed, because in that event, as petitioner concedes (Br. 10-11 n.2), the court of appeals would be correct in applying the harmless error standard for nonconstitutional errors and finding the error harmless. On the other hand, if the Court concludes that the admission of Henry's testimony violated the Constitution, a more stringent harmless error standard would be applicable—requiring that the error be shown to be harmless beyond a reasonable doubt. See *Chapman* v. *California, supra*. Because the court of appeals' harmless error ruling was based on the less restrictive harmless error standard, the court of appeals' analysis of the harmless error issue would not be dispositive. The Court would then have to consider two further questions on which the validity of petitioner's conviction would turn. The resolution of either question in the government's favor would require affirmance of the judgment below.

A. Petitioner Failed To Carry His Burden of Establishing A Right to Invoke Collateral Estoppel

The courts of appeals are in agreement that the defendant bears the burden of establishing that collateral estoppel bars the admission of particular evidence. *E.g., United States* v. *Citron*, 853 F.2d 1055, 1058 (2d Cir. 1988); *United States* v. *Ragins*, 840 F.2d 1184, 1194 (4th Cir. 1988); *United States* v. *Mock*, 640 F.2d 629, 631 n.5 (5th Cir. 1981); *United States* v. *Gentile*, 816 F.2d 1157, 1162 (7th Cir. 1987); *United States* v. *Baugus*, 761 F.2d 506, 508 (8th Cir. 1985); *United States* v. *Lasky*, 600 F.2d 765, 769 (9th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Hewitt*, 663 F.2d 1381, 1387 (11th Cir. 1981). Moreover, as the Ninth Circuit explained in *Lasky*, 600 F.2d at 769, it is not enough for the party seeking to invoke collateral estoppel simply to advert to the decision of the earlier court; rather the party must provide a sufficient basis for the trial court "to pinpoint the exact issues previously litigated."[24]

Petitioner thus had the burden in this case of making a record from which the courts below could determine the basis for petitioner's prior acquittal. In particular, petitioner bore the burden of persuading the court that a rational jury could not have " 'grounded its verdict upon an

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[24] Petitioner acknowledges (Br. 41) that it is normally the defendant's burden to prove affirmative defenses based on collateral estoppel and double jeopardy. Nevertheless, relying on a reference in the Advisory Committee note to Fed. R. Evid. 401, he contends (Br. 41-42) that the drafters of the Rules of Evidence intended to reverse that burden when those defenses are raised in an effort to have evidence excluded. The statement on which he relies is the Committee's observation that relevancy "is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Advisory Committee note to Rule 401, 28 U.S.C. App. at 688. That comment does not even remotely support petitioner's argument on the burden of proof issue. The reference to matters that are "properly provable" is plainly a shorthand description of what the Rule refers to as "any fact that is of consequence to the action." Fed. R. Evid. 401. The drafters could not have intended the unelaborated reference to "properly provable" matters to impose on the party offering evidence the burden to anticipate and rebut affirmative defenses, when the law had long placed that burden on the party opposing the admission of the evidence.

issue other than that which the defendant seeks to foreclose from consideration." *Ashe* v. *Swenson*, 397 U.S. at 444.

In this case, petitioner offered nothing to the court, by way of evidence or argument, to suggest what issues the jury must have resolved at the prior trial. The only basis for determining what the prior acquittal resolved was the recollection of the trial judge who heard both cases. His interpretation of the prior verdict would not have foreclosed Henry's testimony, even if *Ashe* v. *Swenson* were extended to this type of case. He stated that in his view, "[petitioner] was not acquitted on the issue of identification" (J.A. 21), and added (*ibid.*):

> Mr. Dowling's presence in the house was not seriously contested in the case but he stated the general defense. Mr. Dowling, I don't think, took the stand.

On that state of the record, petitioner has failed to satisfy his burden of establishing a right to invoke collateral estoppel to exclude Henry's testimony. If petitioner's presence in the Henry house with Delroy Christian was not in dispute, as the district court found, the most plausible explanation for the verdict is that the jury concluded that petitioner's conduct at Henry's house did not satisfy the legal definitions of burglary, robbery, and assault. If that were accepted as the basis for the jury's verdict, Henry's testimony would not be excludable, since the relevance of that testimony did not turn on whether petitioner committed any crimes on that occasion; instead, the evidence was relevant principally because it showed petitioner's association with Christian and his possession of a mask similar to the one used in the bank robbery. Thus, the record in this case will not sustain the finding necessary for the application of collateral estoppel—*i.e.*, that the jury actually and necessarily determined the issue

material to this case in petitioner's favor. Therefore, even if the Court rejects our principal submission in this case, the judgment of the court of appeals affirming petitioner's conviction should be upheld on this basis.[25]

B. The Admission Of Henry's Testimony Was Harmless Beyond A Reasonable Doubt

If the Court concludes that the district court's admission of Henry's testimony rose to the level of constitutional error, and that petitioner met his burden of establishing the right to invoke collateral estoppel, there would remain the question whether that error was harmless beyond a reasonable doubt. Although the Court could of course remand the case to allow the court of appeals to consider that question, we believe that it is clear that any error in admitting Henry's testimony was harmless beyond a reasonable doubt, and in light of the protracted nature of the proceedings in this case, we submit that the Court may wish to address the harmless error issue itself. See *United States* v. *Lane*, 474 U.S. 438, 450 (1986).

1. Both the district court and the court of appeals agreed that the evidence of petitioner's guilt was "overwhelming" (J.A. 46; 9/25 Tr. 16). That was a fair characterization of the three eyewitness identifications and strong circumstantial case that the government presented.

Messer saw the bank robber leave the bank and remove his mask while driving away in the taxi van. Messer had "a clear recollection in [his] own mind of what the face of the man looked like" (9/22 Tr. 198). Messer also "knew I was trying to identify somebody, looking for a feature or a

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[25] As the party defending the lower court's judgment, the United States "may rely on any matter appearing in the record in support of" that judgment. *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982). See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 382 (6th ed. 1986).

face or something like that, because I know I would have to say something to the police officials or give a description or something like that" (9/22 Tr. 194). He also testified that it was a clear afternoon and that there was "no obstruction" of his view of the bank robber as he removed his mask (9/22 Tr. 194-195).

Pichardo's in-court identification was also strong. She testified, "I could be dead and born again, and I will never forget that face. It's that gentleman sitting over there. I would never forget those eyes. I would never forget those looks" (9/22 Tr. 246). And Rosario also made an unequivocal in-court identification of petitioner as the person driving the taxi van (9/23 & 9/24 Tr. 16, 37). Thus, petitioner was identified at trial as the bank robber by three witnesses.[26]

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[26] Contrary to petitioner's suggestion (Pet. Br. 6-7), the force of this identification testimony was not significantly undercut by the fact that the witnesses did not identify petitioner in some of the pretrial identification procedures. Each of the witnesses selected petitioner's picture from one or more pretrial photo arrays. 9/22 Tr. 205-206, 210-213 (Messer); 9/22 Tr. 247-248, 256 (Pichardo); 9/22 & 9/23 Tr. 9-13, 15 (Rosario). Moreover, the witnesses provided entirely plausible explanations for their failure to identify petitioner during other pretrial identification procedures. Despite extensive cross-examination, their explanations were not seriously undercut.

First, none of the witnesses chose petitioner at a lineup. However, the results of that lineup were suspect, since the witnesses viewed the lineup through an office window that, at least one feared, could have permitted the members of the lineup to see them. 9/22 Tr. 212. All three witnesses testified to being scared in that setting. 9/22 Tr. 212 (Messer—"scared like the dickens"); 9/22 Tr. 254-256 (Pichardo—"put down my face * * * [and] covered my eyes"); 9/23 & 9/24 Tr. 14-15 (Rosario). All three witnesses later selected petitioner's photograph from an array made up of the participants in the lineup. 9/22 Tr. 212, 256; 9/23 & 9/24 Tr. 15, 134-136.

Second, Pichardo and Rosario did not immediately advise the police that they recognized petitioner's picture in one of the photo arrays each of them was shown. 9/22 Tr. 252-253; 9/23 & 9/24 Tr. 12. However, both testified that they had recognized petitioner's picture in the array, but did not make an identification because they did not want to become involved. 9/22 Tr. 254; 9/23 & 9/24 Tr. 12-13. Pichardo subsequently went to see a police officer she knew and told him she had actually recognized a picture in the array she had been shown. 9/22 Tr. 252-253.

The totality of this identification testimony warranted the description both lower courts gave it—"overwhelming."

The eyewitness identification testimony was buttressed by circumstantial proof that petitioner planned to use the white Volkswagen as the getaway car. Even without Henry's testimony, the government proved that petitioner had borrowed the white Volkswagen, that on the morning of the robbery it was occupied by a man matching the bank robber's description, that it was present in the vicinity of the bank near the time of the bank robbery, but that the occupants of the Volkswagen drove off when they attracted the attention of the police, and that the robber's movements suggested that he was looking for, but could not find, a planned getaway car.

2. The court of appeals also correctly determined that in the context of this trial there was little likelihood that the jury could have put the Henry evidence to any inappropriate use. When petitioner took the stand, he was impeached with evidence of a prior bank robbery conviction. J.A. 49. The possibility is remote, in view of the district court's repeated instructions as to the limited purpose of Henry's testimony and the fact of the acquittal, that Henry's testimony led any juror to alter his or her view about petitioner's propensity to commit crimes or to reach a verdict on that basis. Accordingly, even if it was constitutional error to admit Henry's testimony, any such error was harmless beyond a reasonable doubt.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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